Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

GARY NIKOLITS, individually and in his official capacity as the Property Appraiser of Palm Beach County, Florida,

Petitioner,

vs.

BARBARA PARRISH, DENNIS WETZEL, and ROBERT LUCAS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's application of *Branti v. Finkel*, 445 U.S. 507 (1980), to a claim based upon an alleged violation of the rights of freedom of speech and association is in conflict with the Supreme Court's recent opinion in *O'Hare Truck Serv., Inc. v. City of Northlake*, ___ U.S. ___, 116 S. Ct. 2353 (1996), which requires the application of the balancing test set forth under *Pickering v. Board of Educ. of Township High School Dist. 205, Will County*, 391 U.S. 563, 568 (1968), to claims involving alleged intermixed violations of these rights.

2. Assuming *arguendo* that the Eleventh Circuit correctly decided that *Branti, supra*, applies to this case, whether the Eleventh Circuit's interpretation of the scope and application of *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti, supra*, is in conflict with the tests established in other circuits.

LIST OF PARTIES

Petitioner Gary Nikolits in his official capacity as the Property Appraiser of Palm Beach County, Florida.

Respondents Barbara Parrish, Dennis Wetzel, and Robert Lucas.

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OPINIONS BELOW

The decision of the U.S. District Court for the Southern District of Florida granting summary judgment to petitioner in both his official and personal capacity is not reported. It is reprinted in the appendix of this petition at pages 18-25 (hereinafter "App.___"). The opinion of the Eleventh Circuit, vacating the grant of summary judgment in favor of petitioner in his official capacity and affirming with respect to the personal capacity claims is reported as *Parrish v. Nikolits*, 86 F.3d 1088 (11th Cir. 1996), *petition for reh'g and reh'g en banc denied*, App. 16-17. It is reprinted in the appendix, App. 1-15.

JURISDICTION

Original jurisdiction in the District Court was based upon 28 U.S.C. § 1331, 28 U.S.C. § 1343(3)-(4), and 42 U.S.C. § 1983. Respondents prosecuted a timely appeal to the Eleventh Circuit pursuant to 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

United States Constitution Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

In Florida, the County Property Appraiser is a constitutionally created office. Fla. Const. art. VIII, § 1(d). The Property Appraiser is charged with "determining the value of all property within the county, with maintaining certain records connected therewith, and with determining the tax on taxable property after taxes have been levied." Fla. Stat. ch. 192.001(3) (1993). The Property Appraiser is empowered to appoint deputies to act on his behalf in carrying out the duties prescribed by law for that office; his deputies are his alter-ego, acting for and on his behalf, thereby making him ultimately responsible for their actions. *Florida Public Employees Council 79, AFSCME v. Martin County Property Appraiser*, 521 So.2d 243, 244 (Fla. 1st DCA 1988); Fla. Stat. ch. 193.024 (1993). Respondents conceded before the lower courts that this office is a policymaking position.

In 1992, Respondents were high management level deputies of the Palm Beach County Property Appraiser. As Director of Human Resources, Parrish implemented the employment policies for the entire office and maintained all confidential employee records. As Director of Information Technologies, Wetzel implemented all changes in technology policies, and was responsible for data processing and records maintenance for the entire office. As Manager of the Commercial Property Appraisal Department, Lucas implemented policy decisions made by the administration. All of them acted as advisors in formulating plans for implementing broad goals and played significant roles in the decision making process.

In November 1992, Nikolits, a Republican, won the county election against the Democratic candidate for the office of Palm Beach County Property Appraiser. Respondents actively supported one of the Democratic candidates in the primary and later transferred their support to the Democratic candidate who ran against Nikolits in the general election.

Before he officially took office, Nikolits sent a letter to the Respondents advising them that a new senior management team would be put in place and that their services would no longer be needed. He assumed he had the right to put together a management team in which he could trust and confide in to carry out his policies. He did not trust Parrish because of her involvement in his termination from employment with the Property Appraiser's office in 1986. Nikolits did not trust Lucas because of their prior disagreements regarding appraisal philosophy. As to Wetzel, Nikolits restructured the Office to merge Wetzel's position into another one for which he was not qualified.

On the day Nikolits officially took office, Respondents objected to signing an acknowledgement that their appointment as deputies by the Property Appraiser is made pursuant to § 193.024, Florida Statutes, and that, as deputies, their duties are to act on behalf of the Property Appraiser to carry out his statutory duties. Thereupon, Nikolits deemed them to have abandoned their positions.

PROCEDURAL BACKGROUND

Respondents instituted this action against Nikolits in his official and individual capacity, claiming that Nikolits violated their right to freedom of speech and association by terminating their employment because of their political associations and active support of his political opponent.

Nikolits filed a motion for summary judgment which explicitly assumed *arguendo* that he discharged the Respondents for political reasons. The District Court granted this motion on all claims on the basis of the doctrine of qualified immunity. Respondents then filed a motion to alter or amend judgment, contending, in part, that summary judgment on their official capacity claims against Nikolits cannot be predicated on qualified immunity because this doctrine only applies to personal capacity claims.

The District Court granted in part and denied in part the Respondents' motion. It granted the motion to the extent the grant of summary judgment on the official capacity claims were based on qualified immunity. However, the District Court still granted Nikolits' motion for summary judgment as to these claims because Respondents were policymaking or confidential employees, thereby making their positions exempt from the bar against patronage dismissals under *Elrod v. Burns*, 427 U.S. 347 (1976).

On review, the Eleventh Circuit vacated and remanded the decision with respect to the official capacity claims and affirmed as to the individual capacity claims. In vacating the lower court decision, the Eleventh

Circuit expressly considered itself as joining the ranks of the Tenth and Fourth Circuits in interpreting *Branti v. Finkel*, 445 U.S. 507 (1980), to teach that party affiliation must be essential to effective performance of a position before an employee holding that position can be susceptible to patronage dismissal. However, the Eleventh Circuit expressly noted that this approach parts ways with the First and Seventh Circuits, which allow patronage dismissals in policymaking positions that do not directly implicate partisan political concerns. Nikolits now seeks review only as to the Eleventh Circuit's ruling on the official capacity claims.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit Improperly Applied *Branti* To A Case Involving Alleged Intermixed Violations Of A Public Employee's Constitutional Rights Of Free Speech And Association.

In *O'Hare Truck Serv., Inc. v. City of Northlake*, ___ U.S. ___, 116 S. Ct. 2353 (1996), this Court announced, for the first time, that the balancing test set forth in *Pickering v. Board of Educ. of Township High School Dist. 205, Will County*, 391 U.S. 563 (1968), and not the legal standard enunciated in *Branti*, must be applied to cases involving alleged intermixed violations of a public employee's constitutional rights of free speech and association:

> Our cases call for a different, though related, inquiry where a government employer takes adverse action on account of an employee['s] . . . right of free speech. There, we apply the balancing test from *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., supra*. See generally *Board of Comm'rs, Wabaunsee*

> *Cty. v. Umbehr*, ___ U.S. at ___, ___ S.Ct. at ___. . . . *A reasonableness analysis will also accommodate those many cases, perhaps including the one before us, where specific instances of the employee's speech, which require balancing in the* Pickering *context, are intermixed with a political affiliation requirement. In those cases, the balancing* Pickering *mandates will be inevitable.*

O'Hare, 116 S. Ct. at 2358 (emphasis added). The same day, in *Board of County Comm'rs, Wabaunsee County v. Umbehr*, ___ U.S. ___, 116 S. Ct. 2342, 2347-48 (1996), this Court detailed how the *Pickering* balancing test should apply to such cases.

However, just a few days later, the Eleventh Circuit applied *Branti* to Respondents' claims against Nikolits for alleged intermixed violations of their rights of free speech and association. In so doing, the Eleventh Circuit applied the wrong legal standard in light of this Court's announcement in *O'Hare*, vacated the grant of summary judgment in favor of Nikolits, and remanded the case with instructions to apply the *Branti* test.

As this Court did in *O'Hare*, the Eleventh Circuit should have remanded the case for an application of the *Pickering* balancing test, or, at least, for a determination as to whether the *Pickering* standard or *Branti* standard should apply.

This is an "intermixed" case because Respondents alleged that Nikolits violated their constitutional right to freedom of speech *and* association by terminating their employment because of their "political activities and associations."

II. Even If *Branti* Properly Applies To This Case, The Inconsistent, Confusing And Widely Divergent Tests Established By The Circuit Courts For Determining When Political Patronage Dismissals Are Constitutional Requires Review By This Court To Provide Guidance To Lower Courts And To Elected Officials.

This Court expressed its opinion with respect to political patronage dismissals on only two occasions in the last twenty years. *See Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). Generally, First Amendment protection was extended to public employees against discharge for their political beliefs and associations.

This Court, though, recognized an exception to the general rule against political patronage dismissals. In *Elrod*, it was suggested that policymaking and confidential employees were constitutionally subject to political patronage dismissals. 427 U.S. at 367-68 (plurality), and 375 (Stewart, J., concurring in judgment). Later, in *Branti*, the test for determining when employees could be terminated for their political beliefs and associations consistent with the First Amendment was modified:

> [T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

445 U.S. at 518.

However, the *Branti* standard has been criticized as "certain to create vast uncertainty," as well as creating confusion for public officials and lower courts. *Id.* at 524 (Powell, J., dissenting); Susan L. Martin, *A Decade of Branti Decisions*: A Government Official's Guide to Patronage Dismissals, 39 Am. U. L. Rev. 11, 22, n.101 (1989); *see also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111 (1990) (Scalia, J., dissenting) ("What it means is anybody's guess."). The *Elrod* and *Branti* decisions provide very little guidance to assist lower courts on how to apply their exception to the general proscription against political patronage dismissals. *See Upton v. Thompson*, 930 F.2d 1209, 1213 (7th Cir.), *cert. denied*, 503 U.S. 906 (1992); *Brown v. Trench*, 787 F.2d 167, 168 (3d Cir. 1986); *Figueroa-Rodriguez v. Aquino*, 863 F.2d 1037, 1043 (1st Cir. 1988); *Hawkins v. Steingut*, 829 F.2d 317, 320 (2d Cir. 1987). The result has been that circuit courts have set forth inconsistent, confusing, and divergent standards. *See Selch v. Letts*, 5 F.3d 1040, 1047 (7th Cir. 1993); *Upton v. Thompson*, 930 F.2d at 1213-14, 1218; *Stott v. Haworth*, 916 F.2d 134, 144 (4th Cir. 1990); Cynthia G. Bowman, *The Law of Patronage at a Crossroads*, 12 J.L. & Politics 341, 344 (1996); Martin H. Brinkley, *Despoiling the Spoils*: Rutan v. Republican Party of Illinois, 69 N.C. L. Rev. 719, 736-37 (1991); Steven G. Heinen, Note, *Political Patronage and the First Amendment*: Rutan v. Republican Party of Illinois, 14 Harv. J. L. & Pub. Policy, 292, 292-303 (1991); Barry N. Johnson, Note, Rutan v. Republican Party of Illinois: *Another Attempt to Eliminate Political Patronage*, 27 Willamette L. Rev. 405, 428 (1991); Ashutosh Bhagwat, Note, *Patronage and the First Amendment*: A Structural Approach, 56 U. Chi. L. Rev. 1369, 1369-1401 (1989).

As a further consequence, elected government officials are confused as they do not know which public employees can lawfully be dismissed on the basis of their political beliefs or associations. *See Upton*, 930 F.2d at 1218. They are confronted with a dilemma: do they rehire all of the employees from the prior administration, thereby taking the risk that some of them will thwart the new administration's policies, not only ruining the political success of the official but defeating the will of the citizens who sanctioned those policies; or, do they take their best guess as to which employees may lawfully be terminated for political patronage, thereby risking the violation of their First Amendment rights, as well as the likelihood of costly and unproductive litigation.

A. Inconsistent, Confusing And Widely Divergent Tests Have Been Established By The Circuit Courts For Determining When Political Patronage Dismissals Are Constitutionally Permissible

Eleventh Circuit: The Eleventh Circuit below vacated and remanded the decision with respect to the official capacity claims, asserting that the District Court applied the wrong standard in determining that Respondents held positions subject to political patronage dismissals. In so doing, the Eleventh Circuit believed the District Court to have improperly applied the *Elrod*, not *Branti*, standard when it considered the fact that Respondents were policymakers as determinative. The Eleventh Circuit interpreted *Branti* to make the policymaker and confidential labels irrelevant.

The proper test, according to the Eleventh Circuit opinion below, is the *Branti* ultimate inquiry test set forth above. In elaborating upon *Branti*, the Eleventh Circuit considered the interest in ensuring effective government and efficient government employees as not being a proper factor for consideration under this standard. Neither should political affiliation or loyalty be considered as equating with confidence elected officials may have with their employees. Nor do employee salaries indicate a position that requires a particular party affiliation.

The Eleventh Circuit considered itself as joining the ranks of the Tenth and Fourth Circuits in interpreting *Branti* to teach that party affiliation must be essential to effective performance of a position before an employee holding that position can be susceptible to patronage dismissal. Under this interpretation, the Eleventh Circuit considers the inherent powers and actual job responsibilities of the position involved and the relationship of the particular position to the elected official as relevant. Citing to the First and Seventh Circuits, the Eleventh Circuit noted that this approach parts ways with those circuits that allow patronage dismissals in policymaking positions that do not directly implicate *partisan* political concerns.

The Eleventh Circuit's views on the proper scope and application of *Branti* not only differs, as it expressly recognizes, with the Seventh and First Circuits' views, but is in conflict with its own precedent and with other circuits. Indeed, most of the circuits have put forth markedly dissimilar standards for determining when political patronage dismissals may be permitted. The paradox is

that the numerous, varied and confusing tests stem from the same two cases, namely *Elrod* and *Branti*.

In *Ray v. City of Leeds*, 837 F.2d 1542, 1544 (11th Cir. 1988), the Eleventh Circuit ruled that a director of community services could be discharged for political reasons because she held a policymaking position. Her political beliefs and compatibility with the hiring authority were deemed to be related to the effective performance of her job because the position required the making of decisions regarding the allotment of scarce resources. *Id.* The *Ray* opinion established that whether the position involved is that of a policymaker should first be determined and, if so, then, consistent with *Branti*, that position is permitted to be terminated on the basis of political affiliation if such affiliation is an appropriate job requirement. *Id.*

In *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989), deputy sheriffs were held to have been constitutionally dismissed for political reasons. In *Terry*, loyalty to the elected sheriff was an appropriate requirement for the job of deputy since the sheriff could be held liable, under Alabama law, for the deputies' actions. *Id.* The closeness and cooperation required between the elected sheriff and his deputies, therefore, was deemed to permit the sheriff to have absolute authority over the hiring of deputies. *Id.*

In *Terry*, the court saw no practical difference between the lack of loyalty punished by the sheriff and the lack of party affiliation punished by the defendants in *Elrod* and *Branti*. *Id.* Thus, the *Elrod-Branti* test was modified by the Eleventh Circuit "to read: whether loyalty to the individual sheriff is an appropriate requirement for the effective performance of the particular position." *Id.*

at 380 (Fay, J., specially concurring). This interpretation of *Elrod-Branti* focuses on how a public employee's right to harbor certain political beliefs affect employee loyalty and the performance of governmental functions.

In *Parrish*, the Eleventh Circuit abandoned *Ray* to the extent that *Ray* held that positions involving policymaking are not only relevant, but, in an appropriate case, dispositive. It also deserted *Terry* to the extent this opinion relied upon employee loyalty as not only applicable but dispositive in positions that subject an elected official to civil liability. Additionally, the *Parrish* court does not consider political affiliation or the loyalty so central to *Terry* to equate with confidence an elected official may have in his employees.

Rather, the *Parrish* opinion's strict reading of *Branti* to require party affiliation as an essential requirement for the effective performance of the job reduces the test to the following question: why do you have to be a Democrat or a Republican to effectively perform the job? Under this test, even the interest in ensuring effective implementation of policies would be irrelevant if party affiliation is not essential to effective job performance. By its strict reading of *Branti*, *Parrish* did violence to *Ray* and *Terry* and confined them as permitting only a consideration of the inherent and actual job responsibilities of the position and the relationship of the particular position to the elected official. Indeed, it is doubtful that the outcomes in *Ray* and *Terry* would stand under the *Parrish* test.

First Circuit: By further contrast, the First Circuit interprets *Elrod* and *Branti* differently. It calls for a determination of: (1) whether the agency in which a discharged plaintiff had served was engaged in activity whose direction or pace properly could be affected by partisan political considerations; and, (2) whether the particular position was a policymaking or confidential one. *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986) (*en banc*); *Agosto-De-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1212 (1st Cir. 1989).

The focus of the second prong is on the powers inherent in a given office or the function of the office and, in contrast with the *Parrish* opinion, not the actual duties performed. *Id.* at 242. This "test is whether the position held by the individual authorizes, either directly or indirectly, a meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation." *De Abadia v. Izquierdo Mora*, 792 F.2d 1187, 1192 (1st Cir. 1986) (quotations and citations omitted).

Also in contrast with *Parrish*, under *Jimenez Fuentes*, *Branti* does not make irrelevant the issue of whether the position involved is that of a policymaker or of a confidential employee; rather, this issue remains relevant under *Branti*. 807 F.2d at 240, 242. Indeed, the First Circuit has interpreted *Elrod* and *Branti* to hold that employees whose jobs can be categorized as policymaking or confidential are exempted from the proscription against political patronage dismissals as long as party affiliation is an appropriate requirement for the position. *Agosto-De-Feliciano*, 889 F.2d at 1216 n.5; *see Jimenez Fuentes*, 807 F.2d at

240 n.7. This opinion is consistent with *Ray*, but inconsistent with *Parrish*. It is also interesting to note that while *Parrish* considers salary irrelevant, *Jimenez Fuentes* does not. 807 F.2d at 242.

Second Circuit: *Branti* has been interpreted even differently by the Second Circuit. According to that circuit, the *Branti* test means "that political affiliation is an appropriate requirement when there is a rational connection between shared ideology and job performance, a reading which would exempt from protection most policymaking and confidential employees . . . . " *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988). To determine if this connection exists it is necessary to examine the functions of the job. *Regan v. Boogertman*, 984 F.2d 577, 580 (2d Cir. 1993). Under this formulation, there are several relevant factors including, in part, whether the position is authorized to speak in the name of policymakers, whether it is perceived as a policymaking position by the public, and the power inherent in the office. *Vezzetti v. Pellegrini*, 22 F.3d 483 (2d Cir. 1994); *Regan*, 984 F.2d at 580.

Shared ideology, according to this circuit, is likely not more important than when an elected official appoints a deputy, who may act in his stead, because elected officials must be able to have trusted advisors and alternates who are directly accountable to them since they are charged with carrying forth the mandate of the electorate. *Regan*, 984 F.2d at 580. While this would appear to be consistent with *Terry*, it is antithetical to *Parrish*. Indeed, under this standard, Nikolits in the case *sub judice* should have been, as the District Court held, permitted to discharge the Respondents, consistent with the First Amendment, since

the Respondents were the alter ego of Nikolits under Florida law.

Although using the terms as a shorthand, the Second Circuit interprets *Rutan*, *Branti*, and *Elrod* as holding that political affiliation and political views are permissible employment criteria for policymaking and confidential employees. *Kaluczky v. City of White Plains*, 57 F.3d 202, 208 (2d Cir. 1995); *see Vezzetti*, 22 F.3d at 486. It even refers to this interpretation as the "Policymaker Doctrine." *Id.* This approach is counter to the Eleventh and First Circuit opinions in *Ray*, *Terry*, and *Jimenez Fuentes*, which qualify the instances when a policymaker or confidential employee may be dismissed for political patronage.

Third Circuit: The Third Circuit has its own version of the *Branti* test: if a difference in party affiliation would be highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office, then dismissals for that reason are permissible. *Ness v. Marshall*, 660 F.2d 517, 521 (3d Cir. 1981). In this circuit, the focus of the inquiry is on the function of the public office in question, *Brown v. Trench*, 787 F.2d 167, 168 (3rd Cir. 1986), and the nature of the responsibilities of the position is critical. *Zold v. Township of Mantua*, 935 F.2d 633, 635 (3d Cir. 1991). Also relevant is whether the employee has meaningful input into decision making concerning the nature and scope of a major government program. *Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1353 (3d Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 62 (1994).

Contrary to the *Parrish* opinion, under the Third Circuit's analysis, the fact that the employee is in a policymaking or confidential position under *Elrod* is a

relevant, important and influential factor. *Zold*, 935 F.2d at 640; *Brown v. Trench*, 787 F.2d at 168-69. Indeed, even nonpolicymaking and nonconfidential employees may be discharged if they act as advisors or formulate plans for the implementation of broad goals. *Zold*, 935 F.2d at 635. Also adverse to *Parrish* is the Third Circuit's consideration of salary in this inquiry. *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993).

Fourth Circuit: Adding another variation of *Elrod-Branti*, the Fourth Circuit, at least initially, suggested that *Branti* put forth an "extremely narrow" requirement: that affiliation with the public employer's political party be essential to the employee's effectiveness in discharging the responsibilities of the position held. *McConnel v. Adams*, 829 F.2d 1319, 1324 (4th Cir.), *cert. denied*, 486 U.S. 1006 (1988); *Jones v. Dodson*, 727 F.2d 1329, 1334, n.6, 1336 (4th Cir. 1984). According to this Circuit, *Branti* emphasizes "the extent to which the discharged employees engage in policymaking related to 'partisan political interests' and have access to confidential information 'bearing whatsoever on partisan political concerns.' " *Id.* at 1338. However, its characterization of *Branti* elevates affiliation with a political party to a mandatory requirement for the effective performance of the job – a view in which the Eleventh Circuit shares in *Parrish*.

Nevertheless, this formulation is at odds with the First, Second, and Third Circuits, as well as the Eleventh in *Terry* discussed above. These circuits do not look to the reason for why party affiliation must qualify the person for the position. Rather, those circuits look primarily to

the appropriateness of party affiliation, partisan political interests or concerns of the governmental agency involved, rational connections between shared ideology and job performance, functions of the position in the policy implementation process, or the need for political loyalty between the elected official and public employees.

Interestingly, after *Rutan*, however, the Fourth Circuit apparently departed from its prior opinions. It combined the First Circuit's *en banc* decision in *Jimenez Fuentes, supra*, with the Second Circuit's formulation in *Savage v. Gorski, supra*, and this Court's suggestion in *Rutan* that certain "high level" employees properly may be discharged on the basis of their political views. *See Stott v. Haworth*, 916 F.2d at 141-42; *Akers v. Caperton*, 998 F.2d 220, 225 (4th Cir. 1993).

Fifth Circuit: In *Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir. 1979), which pre-dates *Branti*, the former Fifth Circuit interpreted Justice Stewart's concurrence in *Elrod* as establishing that policymaking, confidential employees are constitutionally subject to patronage dismissals. *Id.* at 1033-35, 1037-38, 1040. It also held, however, that confidential employees may constitutionally be subject to patronage dismissal, even if they do not stand in a confidential relationship to the policymaking process, as long as they are empowered to conduct all of the business of an elected official and thereby subject the elected official to civil liability for failure to perform his statutory duties. *Id.* at 1040.

In *McCormick v. Edwards*, 646 F.2d 173, 178 (5th Cir.), *cert. denied*, 454 U.S. 1017 (1981), the former Fifth Circuit interpreted *Branti* as holding that assistant public

defenders were neither policymaking nor confidential employees and thus could not be replaced merely because they differed in political allegiance from the public defender. This opinion viewed *Branti* as still considering the policymaker and confidential employee inquiry as material to the analysis.

In *Barrett v. Thomas*, 649 F.2d 1193, 1200 (5th Cir. 1981), *cert. denied*, 456 U.S. 925, *and* 456 U.S. 936 (1982), the former Fifth Circuit interpreted *Branti* to dismiss the labels "confidential" and "policymaker" as irrelevant. However, this opinion, which was relied upon by the Eleventh Circuit in *Parrish*, acknowledged that these terms "illuminate the contours of the employee class that may permissibly be subjected to a political litmus test." *Id.* at 1200-01. This opinion also focused on "political loyalty to the employee's duties." *Id.*

Undoubtedly, the Fifth Circuit viewed *Branti* as narrowing the policymaking and the confidential employee exceptions in terms of effective job performance. *McBee v. Jim Hogg County, Texas*, 730 F.2d 1009, 1012, 1015 (5th Cir. 1984) (*en banc*); *Soderstrom v. Town of Grand Isle*, 925 F.2d 135, 139 (5th Cir. 1991). Indeed, in a more recent opinion, this circuit interpreted *Branti* as expressly rejecting a categorical approach to resolving political patronage cases. *Vojvodich v. Lopez*, 48 F.3d 879, 884 (5th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 169 (1995). This view, while aligned with the opinion below, is in direct conflict with the First Circuit as discussed above.

Sixth Circuit: The Sixth Circuit initially read *Branti* as extending the general rule against political patronage dismissals to professional positions, "so long as they

were not . . . policymaking [or confidential] . . . ." *Messer v. Curci*, 881 F.2d 219, 221-22 (6th Cir. 1989), *vacated on other grounds*, 497 U.S. 1001 (1990); *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988). This view, which is in line with the First Circuit, still keeps viable the categorical approach viewed with disfavor by the Fifth Circuit and the Eleventh Circuit in *Parrish*.

After *Rutan*, the Sixth Circuit continued to have a flexible and fairly broad understanding of *Branti* by interpreting it to state that "political affiliation *could* be the sole basis of termination for public employees who held positions in which [such] affiliation was relevant to the performance of the job." *Williams v. City of River Rouge*, 909 F.2d 151, 153 (6th Cir. 1990). Under its post *Rutan* rendition of *Branti*, whether the position is that of a policymaker was not only considered relevant, *Rice v. Ohio Dept. of Transp.*, 14 F.3d 1133, 1140, 1142 n.9 (6th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2678 (1994), but exempt from the First Amendment's protection. *Monks v. Marlinga*, 923 F.2d 423, 425 (6th Cir. 1991).

Indeed, directly counter to the Eleventh Circuit opinion in *Parrish*, the Sixth Circuit discerns *Branti* "to apply to political differences of any kind, not merely differences in party membership." *Faughender v. City of North Olmsted, Ohio*, 927 F.2d 909, 914 n.2 (6th Cir. 1991). Also inimical to the Eleventh Circuit in *Parrish*, is the Sixth Circuit's focus on "the inherent duties of the position in question, not the work actually performed by the person who happens to occupy the office." *Williams*, 909 F.2d at 154; *Monks*, 923 F.2d at 425-26.

In a singularly unique approach, the Sixth Circuit also requires a consideration of the duties that the new holder of that position will perform. *Faughender*, 927 F.2d at 913. If this examination reveals that the position is inherently political in nature, then political affiliation is an appropriate requirement for the job. *Blair v. Meade*, 76 F.3d 97, 100 (6th Cir. 1996). More recently, this circuit, in disagreement with the Eleventh Circuit in *Parrish*, stated that "the test is not whether party affiliation and support are *essential* to the effective performance of the public office involved; the test, under *Branti*, is whether these are 'appropriate' . . . " requirements and, in such determination, "the judgment of the people's elected representative merits respect." *Rice*, 14 F.3d at 1142.

Seventh Circuit: Although it recognizes that not all policymakers are constitutionally subject to political patronage discharge, the Seventh Circuit interprets *Elrod* and *Branti* as permitting the vast majority of policymakers and confidential employees to be subject to political patronage dismissals. *Lohorn v. Michal*, 913 F.2d 327, 333-34 (7th Cir. 1990); *Meeks v. Grimes*, 779 F.2d 417, 420 (7th Cir. 1985); *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Livas v. Petka*, 711 F.2d 798, 800 (7th Cir.1983); *Nekolny v. Painter*, 653 F.2d 1164, 1169 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). In discussing confidential employees, this Circuit considers political antipathy as a "decent proxy for a lack of trust and loyalty where the employee's responsibilities include a duty to shield the decision making process from the outside world," *Meeks*, 779 F.2d at 420, a view which conflicts with the *Parrish* opinion.

Consistent with the First Circuit, the Seventh Circuit's test for determining the constitutionality of political patronage dismissals is "whether the position held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation." *Nekolny*, 653 F.2d at 1170. Under this standard, the function or inherent powers of the job (as opposed to the actual duties performed) are required to be considered, but the position need not have final decisionmaking authority. *Id.*; *Tomczak*, 765 F.2d at 640-41.

Also relevant in this circuit's inquiry, as it was to the District Court below but not to the Eleventh Circuit, is the salary of the position involved. *Nekolny*, 653 F.2d at 1170. The Seventh Circuit also considers whether the position involved could reasonably serve to threaten the policies of the party in power. *Selch v. Letts*, 5 F.3d 1040, 1044 (7th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994).

A central theme throughout this circuit's opinions appears to be a recognition of political reality and the important role that implementation of policy plays in determining the success of an administration. *Id.* at 1045. Thus, those responsible for the actual provision of public services have, generally speaking, been held to be lawfully subject to political patronage dismissal as long as they have meaningful input into making decisions or the implementation of policy. *Heideman v. Wirsing*, 7 F.3d 659, 663 (7th Cir. 1993). Under this view, elected officials whose political tenure depends on their ability to successfully implement goals and priorities may validly assume that political affiliation will play a part in their

success. *Americanos v. Carter*, 74 F.3d 138, 142 (7th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1853 (1996).

Eighth Circuit: The Eighth Circuit pictures *Elrod-Branti* even differently, albeit in strict terms. In this circuit's view, *Branti* held that "the inquiry is whether political affiliation is an appropriate requirement for a position, not whether it is confidential or policymaking in nature." *Barnes v. Bosley*, 745 F.2d 501, 505-06 (8th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985). Under this circuit's view, at least initially, policymaking or confidential employees are relevant, but the focus is "on the actual duties an employee performs." *Horton v. Taylor*, 767 F.2d 471, 477-78 (8th Cir. 1985). In a complete change of direction from this latter view, the Eighth Circuit held that "the proper focus is on 'the powers inherent in a given office as opposed to the functions performed by a particular occupant of that office.' " *Bauer v. Bosley*, 802 F.2d 1058, 1064 (8th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987) (citations omitted).

Tenth Circuit: The Tenth Circuit has only one case of any import on the issue. It comprehends *Branti* as removing the issue of whether an employee was in a confidential or policymaking position from controlling the inquiry into constitutional political patronage dismissals. *Dickeson v. Quarberg*, 844 F.2d 1435, 1441 (10th Cir. 1988). In this view, the existence of policymaking or confidential relationships may, however, be relevant. *Id.* The Tenth Circuit's main distinguishing point from all of the other circuits is that it focuses on the inherent powers of the position and the actual duties performed – emphasizing the latter. *Id.* at 1442.

B. Need For Guidance And Uniformity

The wide spectrum of standards for determining when political patronage dismissals meet with constitutional favor is intolerable for elected officials. Upon taking office, they are confronted with the need to make decisions concerning the continued employment of the public employees of the prior administration. Their capability to fulfill their public promises and implement the mandate of the citizens is severely impaired by the markedly different, inconsistent and varied standards of the circuit courts. Widespread confusion is the result. This Court should pronounce a rule of law which gives elected officials guidance and protects their ability to confidently implement their policies by placing persons of their own choosing in key public positions, rather than penalize them for trying to keep their promises to the public. This Court should stop the experiment it started twenty years ago in *Elrod*, analyze and evaluate the results, reach a conclusion and give lower courts and elected officials guidance for objective and evenhanded decisionmaking in this area.

CONCLUSION

For all of the foregoing reasons, the Petition for writ of certiorari should be granted.

Respectfully submitted,

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Barbara PARRISH, Dennis Wetzel, and Robert Lucas, Plaintiffs-Appellants,

v.

Gary R. NIKOLITS, individually and in his official capacity as the Property Appraiser of Palm Beach County, Florida, Defendant-Appellee.

No. 95-4807.

United States Court of Appeals, Eleventh Circuit.

July 3, 1996.

Former employees of county property appraiser's office brought action against county property appraiser, alleging that appraiser violated their First Amendment rights by firing them because they supported appraiser's opponent in recent election. The United States District Court for the Southern District of Florida, No. 93-8322-CIV-KLR, Kenneth L. Ryskamp, J., granted appraiser's motion for summary judgment. Employees appealed. The Court of Appeals, Barkett, Circuit Judge, held that: (1) as there was no evidence in record as to whether appraiser's office even implicated partisan concerns, summary judgment for appraiser, in his official capacity, would be vacated; (2) even assuming letter from employees' attorney to appraiser, warning appraiser that discharging employees would violate law, caused appraiser to believe that action he took was contrary to federal law, appraiser's subjective belief was irrelevant to his qualified immunity defense in employees' action against him in his individual capacity; and (3) employees failed to

establish that it was clearly established at time appraiser dismissed employees that their dismissal for political reasons violated their First Amendment rights and, therefore, appraiser, in his individual capacity, was entitled to qualified immunity.

Affirmed in part; vacated and remanded in part.

Appeal from the United States District Court for the Southern District of Florida.

Before CARNES and BARKETT, Circuit Judges, and DYER, Senior Circuit Judge.

BARKETT, Circuit Judge:

Barbara Parrish, Dennis Wetzel and Robert Lucas appeal the district court's grant of Gary Nikolits's motion for summary judgment in both his individual and official capacities on their claim that Nikolits violated their First Amendment rights by firing them because they supported Nikolits's opponent in a recent election.[1] Parrish, Wetzel and Lucas were longtime employees of the Palm Beach County Property Appraiser's Office. Nikolits was the newly-elected Palm Beach County Property Appraiser.

Insofar as Nikolits was sued in his official capacity, we vacate the order granting summary judgment and remand because the district court applied the wrong standard in determining that Parrish, Wetzel and Lucas held positions in the Appraiser's Office that were susceptible

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[1] Parrish, Wetzel and Lucas sued Nikolits under 42 U.S.C. § 1983 alleging that he violated their First Amendment rights to free speech and association.

to patronage dismissal. Insofar as Nikolits was sued in his individual capacity, we affirm the grant of summary judgment because the law was not clearly established that dismissing Parrish, Wetzel and Lucas for political reasons violated their First Amendment rights.

I. Facts & Procedural Background

Parrish was Human Resources Director, Wetzel was Information Technologies Director, and Lucas was Manager of the Property Analysis Section of the Palm Beach County Property Appraiser's Office. During the 1992 election for County Property Appraiser, all three supported the Democratic candidate against Nikolits, who was the Republican candidate and ultimate winner of the race for County Property Appraiser.

After his election, but before taking office, Nikolits notified Parrish, Wetzel and Lucas, as well as five other Appraiser's Office employees, that he planned to fire them because they had not supported him in the elections. Parrish's attorney sent Nikolits a letter stating that such action would violate Supreme Court cases prohibiting patronage firings of non-political public employees. Nonetheless, the day he took office, Nikolits fired Parrish, Wetzel and Lucas, as well as the five other employees.

Prior to Nikolits taking office in January, 1993, Rebecca Walker was Palm Beach County Appraiser[2] from

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[2] In Florida, the office of the county property appraiser is a constitutionally created office. *See* Fl. Const. art. VIII, § 1(d). The

1982 to 1993. Although Parrish, Wetzel and Lucas all had been promoted during Walker's tenure, none of the three had been hired by Walker. Parrish and Lucas had worked for the Appraiser's Office in various capacities since 1976 and 1981, respectively. Wetzel had worked for either the Appraiser's Office or Palm Beach County since 1970. All three thus had been employees of the Appraiser's Office or Palm Beach County through the terms of at least two county appraisers prior to Nikolits taking office in 1993.

After Nikolits fired them, Parrish, Wetzel and Lucas sued Nikolits in both his individual and official capacities, alleging that he had violated their First Amendment rights by firing them for supporting his political opponent in the campaign for Palm Beach County Property Appraiser. Nikolits moved for summary judgment. He first argued that Parrish, Wetzel and Lucas had offered no evidence that they were fired for political reasons. Alternatively, Nikolits argued that, because Parrish, Wetzel and Lucas held policymaking positions, Nikolits did not violate their First Amendment rights even if he fired them for political reasons.

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county property appraiser is charged with "determining the value of all property within the county, with maintaining certain records connected therewith, and with determining the tax on taxable property after taxes have been levied." Fla.Stat. § 192.001(3) (1977). "Property appraisers may appoint deputies to act in their behalf in carrying out the duties prescribed by law." Fla.Stat. § 193.024 (1980). Property appraisals are carried out pursuant to state statute, *see* § 193.011 *et seq. Florida Statutes*, as well as professional appraisal standards established by the International Association of Assessing Officers and the Appraisal Institute.

The district court granted summary judgment in favor of Nikolits on the latter ground, both in his individual and official capacities. On the official capacity claim, the district court determined as a matter of law that Parrish, Wetzel and Lucas were "policymakers" and that, as such, Nikolits did not violate their constitutional rights even if he had fired them for political reasons. On the individual capacity claim, the district court held that, because the law was not clearly established that persons holding positions similar to those held by Parrish, Wetzel, and Lucas were "policymakers," qualified immunity applied and Nikolits did not violate clearly established law of which a reasonable person would have known in dismissing them for political reasons. We affirm the order granting summary judgment in favor of Nikolits insofar as he was sued in his individual capacity because the law was not clearly established that dismissing Parrish, Wetzel and Lucas for political reasons violated their First Amendment rights. But we vacate and remand the summary judgment insofar as Nikolits was sued in his official capacity because we find that the district court applied the wrong standard in making that determination.

II. Analysis

In *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), a newly-elected Democratic sheriff of Cook County, Illinois, discharged certain non-civil service employees, including the Chief Deputy of the Process Division, a bailiff/security guard, and a process server, "because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders." *Id.* at 351, 96 S.Ct. at 2678.

Writing for a three-judge plurality of the majority,[3] Justice Brennan reasoned that the practice of patronage dismissals "clearly infringes First Amendment interests," and that

> if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

Id. at 362, 96 S.Ct. at 2685. Justice Brennan considered and rejected the interest of ensuring effective government and efficient public employees as an end that justified patronage, concluding that patronage dismissals were not the least restrictive means of achieving this end because public employees could be discharged for insubordination or poor job performance when those bases in fact exist. *Id.* at 364-67, 96 S.Ct. at 2685-86. Justice Brennan also considered and rejected the interest of preserving the democratic process and partisan politics, concluding that, because "patronage [also] is an effective *impediment* to associational and speech freedoms," "the gain to representative government provided by the practice of patronage, if any, would be insufficient to justify its sacrifice of First Amendment rights." *Id.* at 369-70, 96 S.Ct. at 2688 (emphasis added).

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[3] Justice Brennan wrote the opinion, joined by Justices White and Marshall. Justice Stewart wrote a separate opinion concurring only in the judgment that was joined by Justice Blackmun.

Justice Brennan finally considered the need for political loyalty of employees to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration. He reasoned that "[t]he justification is not without force, but is nevertheless inadequate to validate patronage wholesale." He went on to state that "[l]imiting patronage dismissals to *policymaking positions* is sufficient to achieve this governmental end." *Id.* at 367, 96 S.Ct. at 2687. Justice Brennan thus acknowledged a limited exception for policymaking positions to the general prohibition against patronage dismissals. He expounded on the contours of the exception:

> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.

Id. at 367-68, 96 S.Ct. at 2687. Justice Brennan noted that the governmental entity carried the burden of demonstrating an interest sufficient to override an encroachment on the First Amendment rights of a public employee, and that close cases should be resolved in favor of the employee.

In a short concurring opinion, Justice Stewart reasoned that the "single substantive question involved . . . is whether a nonpolicymaking, *nonconfidential* government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political belief." 427 U.S. at 375, 96 S.Ct. at 2690 (emphasis added). Justice Stewart's concurrence thus limited First Amendment protection to positions that were both nonpolicymaking and nonconfidential.

Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), was the first case in which the Supreme Court announced a majority opinion on the issue of patronage dismissals. *Branti* involved two assistant public defenders who were among six threatened with dismissal from a staff of nine because they were Republicans. The Court held that the dismissals would violate the First Amendment. In so holding, the Court stated that

> "[t]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

Id. at 518, 100 S.Ct. at 1295.

Branti recognized that circumstances may exist in which "a position may be appropriately considered political even though it is neither confidential nor policymaking in character" but that "party affiliation is not necessarily relevant to every policymaking or confidential position." *Id.* at 518, 100 S.Ct. at 1294. Thus *Branti* recognized that a "policymaking" test would not be appropriate for a state university football coach, for example, even though he "formulates policy" in a sense, but such a test would be appropriate for a nonpolicymaking gubernatorial assistant hired to deal with political issues. *Id.*

With these principles in mind, we must determine whether, in this case, the district court erred in concluding that Nikolits legally could dismiss Parrish, Wetzel and Lucas. Although the district court briefly cited *Branti*, it is clear from the district court's order granting summary judgment for Nikolits that it applied the standard set forth in *Elrod*, not *Branti*:

> [T]he court finds that summary judgment is proper on the basis that plaintiffs held *policymaking positions*. . . . Patronage dismissals of government employees holding *policymaking positions* do not violate the First Amendment. . . . [I]n determining whether an employee occupies a *policymaking position*, consideration should be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals."

In so proceeding, the district court considered determinative the fact that Parrish, Wetzel and Lucas were "policymakers."[4]

Although the record reflects disputed material facts as to whether Parrish, Lucas and Wetzel were policymakers, the district court committed a more basic legal error. After *Branti*, "[t]he ultimate inquiry is *not* whether the label 'policymaker' or 'confidential' fits a particular position," rather it is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. Indeed, the former Fifth Circuit, shortly after *Branti* was decided, interpreted *Branti* as "dismissing the labels 'confidential' and 'policymaker' as irrelevant." *See Barrett v. Thomas*, 649 F.2d 1193, 1200 (5th Cir. Unit A 1981).

It is important to place to the side issues that should not enter an analysis of determining whether party affiliation is an appropriate requirement for the effective performance of a particular position. The interest in ensuring effective government and efficient government employees should not be a factor in determining whether an employee is susceptible to patronage dismissal. This is an interest that is appropriately addressed by dismissals for insubordination or incompetence. In addition, political affiliation or loyalty does not equate with confidence

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[4] The court acknowledged that factual disputes existed as to whether Parrish, Wetzel and Lucas held *confidential* positions, but concluded that there was no factual dispute that Parrish, Wetzel and Lucas held policymaking positions and that, as a result, they were subject to patronage dismissal.

an elected official may have in his or her employees. *See Branti*, 445 U.S. at 520 n. 14, 100 S.Ct. at 1295-96 n. 14. Similarly, high salaries are not indicative of a position that requires a particular party affiliation as government employees' pay should be a reflection of competence, ability and experience, rather than a reward for party affiliation.

In reading *Branti* this way, we fall into line with those circuits interpreting *Branti* as teaching that *party affiliation* must be essential to effective performance of a position before an employee holding that position can be susceptible to patronage dismissal. *See Dickeson v. Quarberg*, 844 F.2d 1435, 1443 (10th Cir.1988); *Jones v. Dodson*, 727 F.2d 1329 (4th Cir.1984). The inherent powers and actual job responsibilities of the position involved, and the relationship of the particular position to the elected official, also should be part of the analysis. *See Terry v. Cook*, 866 F.2d 373, 377-78 (11th Cir.1989); *Ray v. Leeds*, 837 F.2d 1542, 1544 (11th Cir.1988). We part ways with those circuits that allow patronage dismissals in policymaking positions that do not directly implicate *partisan* political concerns. *See Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 249-50 (1st Cir.1986); *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir.1985).

In this case, the district court did not address how Nikolits met his burden of demonstrating that party affiliation is an appropriate requirement for the effective performance of the positions at issue here, involving computers, appraisal standards and personnel matters.

There is no evidence in the record as to whether the Appraiser's Office, whose mission is to appraise property

for tax purposes based on formulae set by statute and professional standards, even implicates partisan concerns in the first instance. We conclude, in light of the current record, that summary judgment insofar as Nikolits was sued in his official capacity must be vacated.

Insofar as Nikolits was sued in his individual capacity, the district court granted him summary judgment on qualified immunity grounds. *See, e.g., Hill v. Dekalb Regional Youth Detention Ctr.*, 40 F.3d 1176, 1184-85 n. 16 (11th Cir.1994) (explaining the difference between individual capacity claims and official capacity claims). The plaintiffs appeal that order, as well. Because "[a] decision on qualified immunity is separate and distinct from the merits of the case," *Lassiter v. Alabama A & M Univ. Bd. of Trustees*, 28 F.3d 1146, 1151 (11th Cir.1994) (en banc), our previous discussion does not dispose of the qualified immunity issues in this case.

The Supreme Court has explained that the policies behind the qualified immunity defense dictate that it be decided as early as possible in a case. *See, e.g., Behrens v. Pelletier*, ___ U.S. ___, ___, 116 S.Ct. 834, 838-40, 133 L.Ed.2d 773 (1996); *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6, 107 S.Ct. 3034, 3042 n. 6, 97 L.Ed.2d 523 (1987) ("[W]e have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation."). Accordingly, we turn to the district court's order granting summary judgment to Nikolits in his individual capacity on qualified immunity grounds.

Once a public official or employee defendant raises a qualified immunity defense, the "plaintiffs bear the burden of showing that the federal 'rights' allegedly violated

were 'clearly established.' " *Lassiter*, 28 F.3d at 1150 n. 3. In seeking to discharge that burden, the plaintiffs in this case rely upon the fact that their attorney sent Nikolits a letter warning him that discharging plaintiffs would violate the law. Even if we were to assume that that letter actually caused Nikolits to believe that the action he took was contrary to federal law (and there is no evidence that it did), we have previously held that the subjective belief of the defendant is irrelevant to a qualified immunity inquiry, because the measure is purely one of objective legal reasonableness. *Lassiter*, 28 F.3d at 1150.

Plaintiffs also contend that Nikolits is not entitled to qualified immunity, because the *Elrod* and *Branti* decisions clearly established the constitutional rule of law that Nikolits' actions violated.

Under our case law, Nikolits is entitled to qualified immunity in his individual capacity unless Parrish, Wetzel and Lucas can demonstrate not only that Nikolits violated *Branti* in firing them, but also that it was *clearly established* at the time that Nikolits's actions violated *Branti*. *See Williamson v. F.H. Mills*, 65 F.3d 155, 157 (11th Cir.1995) (quoting *Lassiter*, 28 F.3d at 1150). The Supreme Court stated in *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 133 L.Ed.2d 773 (1987), that, for a plaintiff to overcome qualified immunity,

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

> This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

483 U.S. at 640, 107 S.Ct. at 3039.

We recently held in *Beauregard v. Olson*, 84 F.3d 1402, 1405, (11th Cir.1996), that it was not clearly established under *Branti* that the dismissal of clerical employees of a county tax collector's office for political reasons violated their First Amendment rights. *Beauregard* controls the qualified immunity analysis in this case. Moreover, it is not entirely without significance that the district court, with full briefing and two years after Nikolits' actions, concluded that those actions did *not* violate the law. Finally, we note that plaintiffs' argument that the law was clearly established by *Elrod* and *Branti* is further undermined by the split of the circuits concerning what those two decisions mean. *See supra* our discussion at 2510; *see also Mitchell v. Forsyth*, 472 U.S. 511, 533-36, 105 S.Ct. 2806, 2819-20, 86 L.Ed.2d 411 (1985) (holding that official defendant was entitled to qualified immunity and noting that legal uncertainty about the meaning of a Supreme Court decision was "reflected in the decisions of the lower federal courts").

While we have endeavored in this opinion to provide some specific guidance to the district courts on this subject, in examining clearly established law for qualified immunity purposes, we look only to the law as it existed on January 5, 1993, the date Nikolits terminated the plaintiffs' employment. *See, e.g., Mitchell*, 472 U.S. at 530-36, 105 S.Ct. at 2817-20, 86 L.Ed.2d 411 (1985); *Belcher v. City*

of Foley, Ala., 30 F.3d 1390, 1400 n. 9 (11th Cir.1994). Under these standards, we affirm the district court's grant of summary judgment to Nikolits insofar as he was sued in his individual capacity.

For the foregoing reasons, we AFFIRM the summary judgment entered in favor of Nikolits on the individual capacity claims and VACATE the summary judgment entered in favor of Nikolits on the official capacity claims and remand this case to the district court for further proceedings consistent with this opinion.

AFFIRMED in part, VACATED and REMANDED in part.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4807

BARBARA PARRISH,
DENNIS WETZEL, ROBERT LUCAS,

Plaintiffs-Appellants,

versus

GARY R. NIKOLITS, individually
and in his official capacity as
the Property Appraiser of Palm
Beach County, Florida,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Sep. 18, 1996)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19___, _____ F.2d _____).

Before: CARNES and BARKETT, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-8322-CIV-RYSKAMP
(Filed May 17, 1995)

BARBARA PARRISH, DENNIS WETZEL and ROBERT LUCAS,

Plaintiffs,

vs.

GARY NIKOLITS, individually and in his official capacity as the Property Appraiser of Palm Beach County, Florida,

Defendant.
_____/

ORDER GRANTING MOTION FOR RECONSIDERATION IN PART AND ORDER GRANTING SUMMARY FINAL JUDGMENT

THIS CAUSE came before the court upon the motion of the plaintiff for reconsideration and rehearing of the court's order granting summary final judgment in favor of defendant. The defendant has responded in opposition. The court has reviewed the pleadings, the memoranda filed by the parties, and is otherwise fully advised in the premises.

Background

On January 3, 1995 this court entered an order granting summary final judgment in favor of defendant, Gary

Nikolits, the Palm Beach County Property appraiser, individually and in his official capacity. In that order, court found that Gary Nikolits, individually and in his official capacity, is entitled to qualified immunity because the law that defendant allegedly violated was not clearly established "through the eyes of an objective, reasonable government official."

In their motion for reconsideration the plaintiffs argue that (1) defendant Nikolits is not entitled to qualified immunity from a 1983 suit in his official capacity, and (2) defendant Nikolits is not entitled to qualified immunity from a § 1983 suit in his individual capacity. Plaintiffs maintain that defendant Nikolits is not entitled to qualified immunity in his official capacity because the official capacity suit is in essence a suit against a local governmental entity to which qualified immunity does not apply. Clearly this was an error in the prior order and the court GRANTS the motion for reconsideration as to defendant Nikolits in his official capacity.

Plaintiffs also disagree with this court's analysis that defendant Nikolits is entitled to qualified immunity in his individual capacity because the law that defendant allegedly violated was not clearly established. Plaintiffs concede that defendant Nikolits is a policymaker but argue that summary judgment is precluded as to defendant Nikolits in his individual capacity because he knew the dimensions of plaintiffs' constitutional rights before he took action against them, and he had no evidence upon which to base his belief that plaintiffs would not support his policies. Moreover, plaintiffs contend that the issue of whether political affiliation is an appropriate requirement for their positions is a question of fact that

cannot be resolved by the court on summary judgment. For the reasons set forth in this court's order dated January 3, 1995, the court DENIES the plaintiffs' motion for reconsideration as to defendant Nikolits in his individual capacity.

Discussion

Although the court finds that it erred in granting summary judgment in favor of defendant Nikolits in his official capacity on grounds of qualified immunity, the court finds that summary judgment is proper on the basis that plaintiffs held policymaking positions.

Generally, public employees cannot be terminated solely for political reasons because it violates their First Amendment rights of freedom of political belief and association. *Elrod v. Burns,* 427 U.S. 347 (1976). However, patronage dismissals of government employees holding policymaking positions do not violate the First Amendment. *Id.* at 367-368. Because their political beliefs may interfere with the discharge of their public duties, the First Amendment rights of policymaking employees may constitutionally be required to yield to the interest of maintaining governmental effectiveness an efficiency. *Id.* at 366.

Because the court granted summary judgment on alternative grounds, the court did not fully address the issue of whether plaintiffs were policymakers in its order dated January 3, 1995. In that order, however, the court outlined the criteria for determining whether an employee holds a policymaking position.

"The ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of office." *Branti v. Finkel,* 445 U.S. 507, 518 (1980). No clear line can be drawn between policymaking and nonpolicymaking positions. *Elrod,* 427 U.S. at 367. The critical inquiry is the nature of the responsibilities. An employee with responsibilities that are not well defined or are of broad scope more likely occupies a policymaking position. *Id.* at 368. Thus, "in determining whether an employee occupies a policymaking position, consideration should be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." *Id.*

Other courts have held that policy-makers may be identified as public employees whose responsibilities require more than simple ministerial competence, whose decisions create or implement policy, and whose discretion in performing duties or in selecting duties to perform is not severely limited by statute, regulation or policy determinations made by supervisors. *See Johnson v. Bergland,* 586 F.2d 993 (4th Cir. 1978); and *Newcomb v. Brennan,* 558 F.2d 825 (7th Cir. 1977).

Plaintiffs concede that as the Property Appraiser for Palm Beach County, defendant Nikolits is a policymaker. And, the county property appraisers are charged with determining the value of all property within the county, with maintaining certain records connected therewith, and with determining the tax on taxable property after taxes have been levied.

Additionally, plaintiffs concede that they performed broad functions such as implementing policies of the office and exercising roles in the decision making process. While the exact nature and duties of plaintiffs may be in dispute, defendant offers evidence that the plaintiffs held policymaking positions. As managers, plaintiffs implemented policies, made recommendations as to procedures and made suggestions as to such decisions as rates, table and studies.

Indeed, plaintiff Parrish earned a yearly salary of approximately $65,000 a year with benefits. It is undisputed that her responsibilities included inter alia, administering procedures and implementing policies, approving salary increases, and keeping positions filled.

Similarly, plaintiff Wetzel earned a yearly salary of approximately $65,000 a year. In his deposition Wetzel stated that "Everything under the appraiser's office with regard to technologies was my concern . . . "[1] Wetzel attended weekly meetings on behalf of the Property Appraisers office in addition to seminars and conferences which were paid by the Appraisers office. Moreover, both Parrish and Wetzel held jobs titled "Division Director." According to the employee handbook, a Division Director is responsible for implementation and execution of clearly defined written division policies and procedures.[2]

Finally, plaintiff Lucas earned $57,000 a year plus benefits. Lucas' job responsibilities included implementing appraisal standards, suggesting appraisal standards

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[1] Deposition, D. Wetzel p. 71.

[2] Defendants Motion for Summary Judgment, P. 11.

and implementing policies set by the office. Additionally, Lucas was responsible for all commercial appraisals and had a staff of 23 people.

Applying the principle enunciated in the *Elrod-Branti* line of cases regarding the criteria for a "policymaking" or "confidential" position to the positions held by plaintiffs, the court finds that plaintiffs held policymaking positions. Clearly, a review of the job responsibilities of the plaintiffs reveal that these responsibilities "require more than simple ministerial competence. . . . " Their decisions created or implemented policy, and their discretion in performing duties or in selecting duties to perform was not severely limited by statute, regulation or policy determinations made by supervisors.

Based on the foregoing the court finds that no genuine issue of material facts exists as to whether plaintiffs held either policymaking or confidential positions. Plaintiffs dismissals were constitutional as patronage dismissals of government employees holding policymaking positions under the *Elrod-Branti* line of cases. Accordingly, defendant Nikolits is not liable in his official capacity, and the court GRANTS summary judgment in favor of defendant Nikolits in his official capacity.

Conclusion

For the reasons set forth above the court rules as follows:

1) The court grants plaintiffs' motion for reconsideration as to this courts order dated January 3, 1995, granting summary final judgment in favor of defendant

Nikolits in his official capacity on the grounds of qualified immunity.

2) That portion of this court's order dated January 3, 1995, granting summary judgment in favor of defendant Nikolits in his official capacity on the basis of qualified immunity is VACATED.

3) The court GRANTS final summary judgment in favor of defendant Nikolits in his official capacity and against plaintiffs on the grounds that plaintiffs' dismissals were constitutional as patronage dismissals.

4) The court DENIES that portion of plaintiffs motion for reconsideration that pertains to the argument that defendant Nikolits is not entitled to qualified immunity from a § 1983 suit in his individual capacity.

5) For the reasons set forth in this court's order dated January 3, 1995, the court reaffirms its ruling that defendant Gary Nikolits is entitled to qualified immunity from a suit brought under § 1983 and summary final judgment is entered in favor of defendant Nikolits and against plaintiff in his individual capacity. Accordingly, it is:

ORDERED AND ADJUDGED that the motion of the defendants for summary judgment is GRANTED. Summary final judgment is hereby entered in favor of defendant Gary Nikolits both in his individual and official capacities, and against plaintiffs. The Clerk of Court shall close this case and any remaining pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 17 day of May, 1995.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:

Fredrick W. Ford
Donna L. DeConna

96-979

Supreme Court, U.S.
FILED
APR 16 1997
OFFICE OF THE CLERK

No. 96-976

In The

Supreme Court of the United States

October Term, 1996

GARY NIKOLITS, individually and in his official capacity as the Property Appraiser of Palm Beach County, Florida,

Petitioner,

vs.

BARBARA PARRISH, DENNIS WETZEL and ROBERT LUCAS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The Petitioner is Gary Nikolits, in his official capacity as the Property Appraiser of Palm Beach County, Florida.

The Respondents, Barbara Parrish, Dennis Wetzel and Robert Lucas are correctly identified in the caption. Frederick W. Ford, P.A. is counsel of record for all Respondents.

Each of the Respondents join in this Brief in Opposition.

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Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the Court of Appeals for the Eleventh Circuit. The court of appeals opinion is reported at 86 F.3d 1088 (11th Cir. 1996), petition for cert. filed. __ U.S.L.W. __ (U.S. December 19, 1996) (No. 96-979) (for the convenience of the Court, all citations to the opinion will be to the opinion attached in the Appendix to the Petition).

STATEMENT OF JURISDICTION

Section 1254(1) of Title 28 of the United States Code provides that the Supreme Court may review cases in the courts of appeal by "writ of certiorari upon the petition of any party. . . ." However, it is respectfully submitted that the Eleventh Circuit Court of Appeals decision in this case does not create inter-circuit conflict, conflict with relevant decisions of this Court, or decide an important question of federal law that has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10(a), (c).

STATEMENT OF THE CASE

Respondents respectfully oppose the Petition for Writ of Certiorari, on the grounds that: (1) this case does *not* involve an intermixed violation of a public employee's right of free speech *and* association, triggering the application of the *Pickering* balancing test as set forth in *O'Hare*[1] and *Umbehr*; and (2) the tests utilized by the various circuits in applying the *Branti* political affiliation criteria to patronage dismissals are not inconsistent, confusing or widely divergent.

A. Course of Proceedings and Disposition of the Case Below

Respondents do not disagree with Petitioner's recitation of the procedural background of this case as contained in the petition.

1. *O'Hare Truck Serv., Inc. v. City of Northlake*, __ U.S. __, 116 S. Ct. 2353 (1996).

B. Corrections of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.1, Respondents bring the following misstatements of facts contained in the Petition to the Court's attention:

1. Petitioner's statement that "Respondents conceded . . . that this office is a policymaking position" leaves the impression that Respondents were referring to their respective positions. That is not true. Respondents agree only that the Property Appraiser himself is a policymaking position, not his subordinates.

2. Petitioner mischaracterizes Respondents' positions as "high management level deputies." (Petition at 2). While Respondents were management employees and, like everyone else in the office, from the Deputy Property Appraiser to the lowliest clerk, were designated on paper as "deputies," they had no authority or power to act on Nikolits' behalf in determining the value of property or determining the tax to be levied.

As Director of Human Resources, Parrish, like all Department Heads and employees, abided by and executed the policies established by the Property Appraiser, in his sole discretion. She never ran the day-to-day operations of the office, did not approve salary increases, could not hire or fire employees and had no authority to establish, change or alter policies. She maintained employee personnel files, but under the Florida Public Records Act, § 119.01, *et seq.*, Florida Statutes, those records are not confidential but are open to the public.

Wetzel was responsible for coordinating the purchase, installation and maintenance of the office technologies, *i.e.*, phones, computers, microfilm, equipment, software programs, communications, requests for electronic data, equipment supplies and technical personnel.

Lucas supervised a staff of 23 appraisal specialists who actually appraised the commercial property the department was responsible to assess in Palm Beach County. His work effort was to implement and follow any policy decisions that were made by administration at least two layers above his level of participation. The appraisal standards utilized were established by the International Association of Assessing Officers ("IAAO") and the Appraisal Institute. These standards were available to the professional appraisers within the Property Appraiser's Office as well as all other professional real estate appraisers. Lucas had no role in establishing those standards and could not change them.

For Petitioner to represent that Respondents "acted as advisors in formulating plans for implementing broad goals and played significant roles in the decision making process" is to mischaracterize and inflate Respondents' duties, authority and level of participation.

3. Petitioner's statements regarding his lack of trust for Parrish and Lucas (Petition at 3) are gratuitous and self-serving and are belied by the facts in the record. Parrish's only involvement in Nikolits' prior termination in 1986 was to extract a ribbon from his typewriter on the orders of the Property Appraiser, Ms. Walker, so that Walker could make a determination whether Nikolits had typed a derogatory letter about her. Parrish performed only ministerial tasks surrounding Nikolits dismissal. She did not make the termination decision.

Nikolits' alleged distrust of Lucas is likewise exaggerated. Whatever differences they had in appraisal philosophy were meaningless because the methodology and standards for appraising property were established by the IAAO and the Appraisal Institute. Whether Lucas disagreed with Nikolits could not have affected the implementation of Nikolits' policies regarding property appraisal.

4. Nikolits' alleged "restructuring" of the office (Petition at 3) did not merge Wetzel's position into another one for which he was not qualified. Nikolits merely retitledthe existing functions and managers. The computer technologies function was retitled the "Department of Geo-Processing and Information Technologies" under the supervision of the Director of the Division of Appraisal Services, a position filled by a financial contributor to Nikolits campaign, who had no computer technologies experience.

5. Finally, Respondents did not object to signing the acknowledgment (Petition at 3). On the day Nikolits took office, Respondents Parrish, Wetzel and Lucas reported to work as usual, but were called into a staff meeting and advised by Nikolits that he had issued a new Employee Handbook and that they were to read it and sign off on an acknowledgment form no later than 11:00 a.m., or they would be terminated. Plaintiffs questioned certain of the wording of the acknowledgment, noted their comments, and returned their signed acknowledgments to Petitioner Nikolits prior to 11:00 a.m. Shortly thereafter, they were called in individually and advised that their services nonetheless were being terminated. They did not abandon their positions.

REASONS FOR DENYING THE WRIT

I.

THE ELEVENTH CIRCUIT PROPERLY APPLIED *BRANTI* TO THIS FIRST AMENDMENT CLAIM BASED ON POLITICAL ASSOCIATION, AND NOT SPEECH, RATHER THAN APPLYING THE *PICKERING* BALANCING TEST REQUIRED FOR "INTERMIXED" VIOLATIONS CASES.

After virtually stipulating at the trial and appellate level that this case involved only political association patronage issues under *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980),[2] Petitioner now changes horses and argues that this is an "intermixed" case between violations of Respondents' Association ***and*** Free Speech rights under the First Amendment, thereby requiring analysis under the balancing test set forth in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

This case is a pure political association case. None of the facts in the record below suggest otherwise. The facts are simple: Respondents supported Nikolits' opponents in the primary and general election. When he won, he fired Respondents and replaced them with his political and financial supporters. No instances of Respondents exercise of free speech rights implicating the balancing test in *Pickering* have been either alleged or proved in the court below.

Respondents' activities did not involve the type of free speech activity present in *Board of County Comm'rs, Wabaunsee County v. Umbehr*, __ U.S. __, 116 S. Ct. 2342 (1996) (outspoken criticism of Commissioners by independent contractor involving speaking at public meetings and letters and editorials in local

2. Nowhere in Petitioner's Brief in the Eleventh Circuit does he even cite the *Pickering* case.

newspapers), cited by Petitioner as authority for applying the *Pickering* balancing test to the circumstances of this case.

Here, Respondents did not publicly criticize Nikolits, who was running for the office of Property Appraiser as an outsider, not an incumbent. They merely campaigned for and financially supported candidates whom they believed were better qualified for the position. It was their political affiliation with Nikolits' opponents that doomed their employment — a classic political association case requiring utilization of the *Branti* "party-affiliation-as-appropriate-requirement-for-effective-performance" test, which the Eleventh Circuit properly applied. *See Barnes v. Bosley*, 745 F.2d 501, 505-506 (8th Cir. 1984) ("The *Pickering* balancing test need not be used in determining whether the first amendment protects political affiliation").

II.

THE TESTS UTILIZED BY THE CIRCUIT COURTS IN APPLYING THE *BRANTI* POLITICAL AFFILIATION CRITERIA TO PATRONAGE DISMISSALS ARE *NOT* INCONSISTENT, CONFUSING OR WIDELY DIVERGENT.

In analyzing Petitioner's attempt to fashion conflicts among the circuits in the application of *Branti*, one is reminded of Shakespeare's classic line in Romeo and Juliet, ". . . a rose by any other name would smell as sweet." (Romeo and Juliet, Act II, Scene II). Or, to alternatively describe the issue, Petitioner essentially is arguing a "distinction without a difference."

A side by side comparison of the tests used by the circuit courts clearly indicates that the various circuits are saying essentially the same thing albeit in slightly different language:

Eleventh Circuit:

> . . . party affiliation must be essential to effective performance of a position before an employee holding that position can be susceptible to patronage dismissal.

Parrish v. Nikolits, 86 F.3d 1088 (11th Cir. 1996) (App. 11).

First Circuit:

> The "test is whether the position held by the individual authorizes, either directly or indirectly, a meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation."

DeAbadia v. Izquierdo Mora, 792 F.2d 1187, 1192 (1st Cir. 1986).

Second Circuit:

The *Branti* test means

> that political affiliation is an appropriate requirement when there is a rational connection between shared ideology and job performance, a reading which would exempt from protection most policymaking and confidential employees. . . .

Savage v. Gorski, 850 F.2d 64, 68 (2d Cir. 1988).

Third Circuit:

> . . . should a difference in party affiliation be highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office, then dismissals for that reason would not offend the First Amendment.

Ness v. Marshall, 660 F.2d 517, 521 (3d Cir. 1981).

Fourth Circuit:

> . . . neither may a public employee be discharged solely because of the employee's political party affiliation, unless the employer can show that affiliation with the employer's party is essential to the employee's effectiveness in carrying out the responsibilities of the position held.

Jones v. Dodson, 727 F.2d 1329, 1334 (4th Cir. 1984).

Fifth Circuit:

> . . . we recognize that "party affiliation may be an acceptable requirement for some types of governmental employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency."

Vojvodich v. Lopez, 48 F.3d 879, 884 (5th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 169 (1995), *quoting Branti*.

Sixth Circuit:

> political affiliation [can] be the sole basis of termination for public employees who held positions in which political affiliation was relevant to the performance of the job.

Williams v. City of River Rouge, 909 F.2d 151, 153 (6th Cir. 1990).

Seventh Circuit:

> The "test is whether the position held by the individual authorizes, either directly or indirectly, a meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation."

Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981).

Eighth Circuit:

> Whether political affiliation is an appropriate requirement for the position.

Barnes v. Bosley, 745 F.2d 501, 506 (8th Cir. 1984), *quoting Branti*.

Tenth Circuit:

> . . . whether the Plaintiff's job required particular political affiliation or association in order to be properly performed.

Dickeson v. Quarberg, 844 F.2d 1435, 1442 (10th Cir. 1988).

It is apparent from this comparison of the decisions of the various circuits that the "widely divergent" tests posited by Petitioner are in actuality nothing more than semantic differences in linguistic expression.

Branti left it to the courts to make the case-by-case "functional analysis" whether a particular government employee qualified for First Amendment protection against politically motivated dismissal. *Ness v. Marshall*, 660 F.2d 517, 520-21 (3rd Cir. 1981). Petitioner inappropriately attempts to characterize the circuit courts case-by-case analysis as creating divergent and confusing standards. Respondents submit that a close look at the cases cited by Petitioner demonstrates that any differences are only those necessitated by the circumstances of those individual cases. The differing application of the *Branti* test to various specific positions is evidence only of the circuit court's wrestling with the individual facts of the cases before them, and has relevance more to qualified immunity for the public official than to the delineation of the correct test to be applied. The various factors considered by the different circuits in making the functional analysis are not mutually exclusive and often overlap. Given the facts of a particular case, some may be relevant to the inquiry and some may not be.

For example, given the particular circumstances of the case, it may be necessary for the court to examine the "inherent duties" of the position involved to determine the appropriateness of political affiliation, while in other circumstances, the actual job responsibilities may be the deciding consideration. That distinction in analyzing the evidence does not create a conflict between the circuits requiring Supreme Court review.

Likewise, all of the circuits consider the policymaking or confidential status of the employee to be relevant to the inquiry, but all follow *Branti* in holding that such status is not controlling,

as it apparently was interpreted as being under *Elrod*, and which the district court below erroneously believed it was. The Eleventh Circuit decision in the instant case properly interpreted the *Branti* test, applied it to the specific facts present and did not create a conflict between its decision and other circuits by holding that "there is no evidence in the record as to whether the Appraiser's Office, whose mission is to appraise property for tax purposes based on formulae set by statute and professional standards, even implicates partisan concerns in the first instance." (App. at 11-12), reversing the district court's grant of summary judgment because the district court had applied the *Elrod* standard and not the *Branti* standard.

CONCLUSION

For the above reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

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